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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 469

PACIFIC EMPLOYERS INSURANCE COMPANY, *Petitioner*,

v.

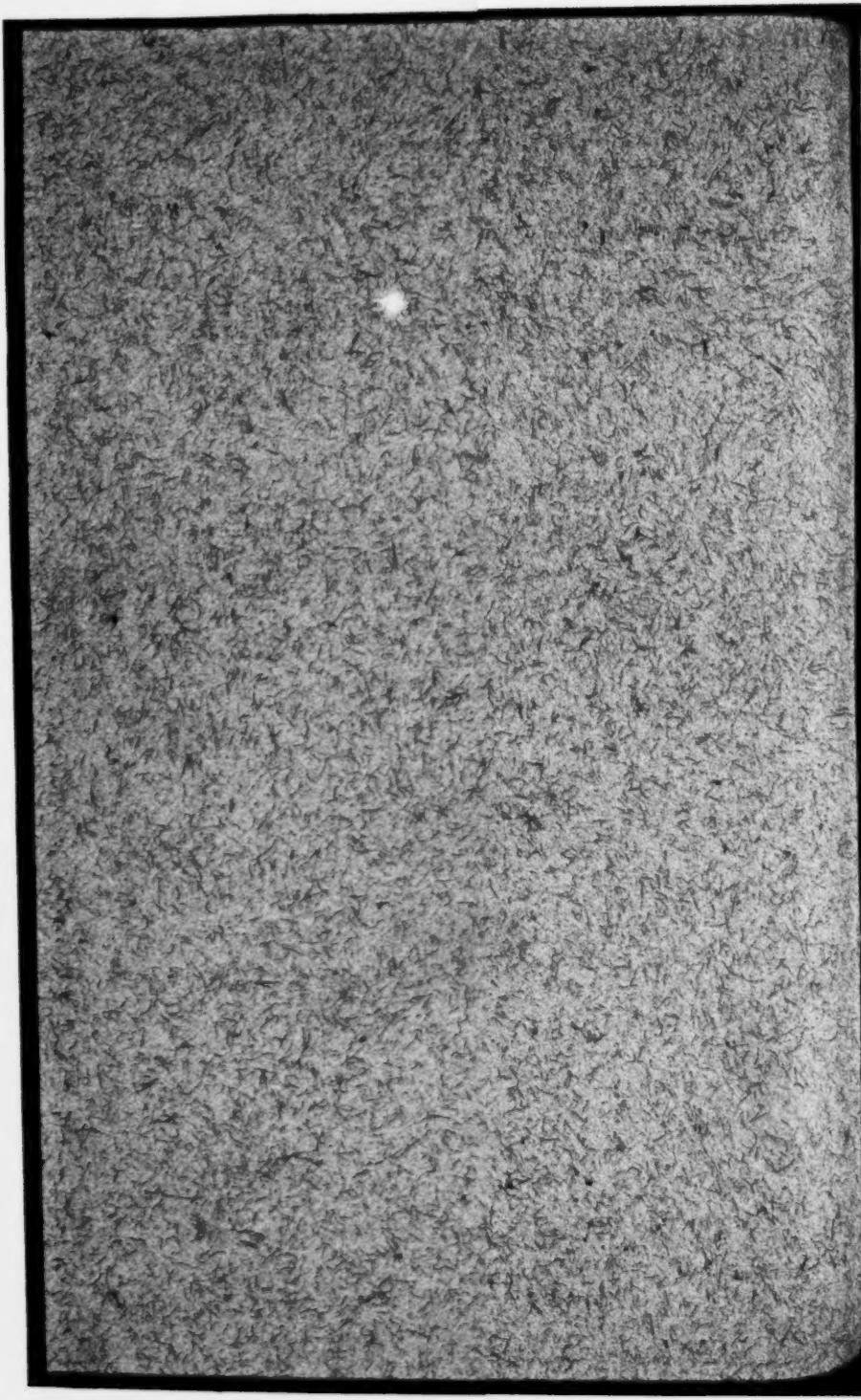
REED ROLLER BIT COMPANY, *Respondent*

## Respondent's Brief in Opposition to the Petition for a Writ of Certiorari


VINSON, ELKINS & WEEMS,
T. B. WEATHERLY,
J. D. HEAD,
*Of Counsel*

J. VINCENT MARTIN,
*Counsel for Respondent*


ALPHA LAW BRIEF CO., HOUSTON



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REED ROLLER BIT COMPANY, *Respondent*

## Respondent's Brief in Opposition to the Petition for a Writ of Certiorari

### Statement of the Case

The Petition for a Writ of Certiorari filed by Petitioner, Pacific Employees Insurance Company, (hereinafter called "Insurance Company") seeks to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 31, 1952. The opinion of the Court of Appeals, which is reported in 198 F. 2d 1, reveals that this case simply involves the construction of a particular insurance policy in the light of a particular fact situation. The Insurance Company has failed to advance any substantial grounds for the granting of a Writ of Certiorari by this Court.

The insurance policy, which is the subject of this action, insures the Respondent, Reed Roller Bit Company (hereinafter called "Reed") against damage sustained by other persons, caused by accident and arising out of its operations. (R. 21) By endorsement No. 1, the coverage of the insurance policy is specifically extended to include the operations of Reed's outside salesmen in the States of Texas, Oklahoma, Illinois, Wyoming, Kansas, and elsewhere in the United States. (R. 19)

This suit was brought by Reed against the Insurance Company in the United States District Court for the Southern District of Texas to recover expenses, attorney's fees, and $11,500.00 paid by Reed to Furman J. Johns (hereinafter called "Johns") in settlement of Johns' suit against Reed and Bay State Abrasive Products Company (hereinafter called "Bay State") in the United States District Court of Maryland. (R. 11, 12) In its Complaint, Reed alleged that the Maryland suit was compromised and settled by Reed after the Insurance Company had refused to defend Reed in the suit or to participate in the settlement of same. (R. 9-11) The Complaint further alleges that in the Maryland suit Johns sought to recover the sum of $100,000.00 in damages from Reed and Bay State for injuries which he received when an abrasive wheel manufactured by Bay State (a company in no way connected with Reed) disintegrated and flew apart while such wheel was being used by Johns on a pneumatic grinding machine manufactured by Reed. (R. 7, 8) In the Maryland suit, Johns charged Reed and Bay State with several different acts of negligence, including a charge that a salesman of Reed, in the scope and course of his employment, negligently represented to Johns and Johns' employer that the Bay State abrasive wheel was fit for use upon Reed's grinding machine and was not dangerous to

use, when, as a matter of fact, such wheel was dangerous and not safe to use on Reed's machine. (R. 37-41) It was upon this allegation of negligence that Reed, a Texas corporation, not doing business in Maryland and with no agent in Maryland, was held in the Maryland Court. (R. 9-10) The opinion of the Maryland Court appears in 89 F. Sup. 654.

The United States District Court for the Southern District of Texas granted a Motion of the Insurance Company to dismiss Reed's complaint in this case for failure to state a claim upon which relief could be granted on the ground that the negligence charged against Reed in the Maryland suit was with respect to one of its products and was excluded from the operations coverage of the policy by the products coverage which Reed had not secured. (R. 29-35, 44-47) On appeal, the Court of Appeals reversed the District Court and remanded the case for trial, holding that the negligence charged against Reed in the Maryland suit with respect to the acts and representations of its agent and salesman regarding the product of another, Bay State, was within the "Premises—Operations" hazard covered by the policy and was not excluded therefrom by the products coverage provisions of the policy. (R. 50-54)

In its Petition for a Writ of Certiorari, the Insurance Company contends that the Court of Appeals erred in failing to hold that Johns' injury was a hazard covered by the products coverage of the policy and, therefore, excluded from the "Premises—Operations" coverage.

## Argument

### I.

**The Court of Appeals correctly held that the negligence charged with respect to the representations of**

**Reed's agent and salesman regarding a product manufactured by another was a hazard covered by the premises—operations coverage of the insurance policy and not the products coverage of the policy.**

The first question raised in the Insurance Company's Petition for a Writ of Certiorari is whether the Court of Appeals erred in failing to hold that the injuries sustained by Johns were not covered by "Premises-Operations" coverage of the insurance policy because the accident occurred while Johns was using a grinding machine made and distributed by Reed. In connection with this queestion, the Insurance Company apparently contends that even though it issued an insurance policy to Reed covering accidents to others arising out of the operations of Reed's salesman everywhere in the United States, nevertheless Reed is not covered for an accident to another arising out of and caused by the operations of one of Reed's salesman if the accident occurs at a time when the injured party happens to be using a product manufactured by Reed, even though the injury is not caused by and does not arise out of the use of Reed's product. The fallacy of the Insurance Company's arguments in connection with this first question is readily apparent when it is realized that such arguments would be equally applicable if, instead of using a Reed grinding machine, the injured man, Johns, had been wearing a hat or a pair of shoes manufactured by Reed at the time the Bay State abrasive wheel flew apart and injured him. Obviously, the products coverage of the insurance policy does not cover injuries which occur while the injured person is using the insured's products unless the injury is caused by or arises out of the use of the products.

The exclusion clause of the insurance policy in this case excludes from the "Premises-Operations" coverage of the

policy only that liability "with respect to which insurance is or can be afforded" under products coverage. (R. 21) The allegations of liability in the Maryland suit which Reed seeks to recover against the Insurance Company in this case were not with respect to any negligence in the manufacture of its grinding machine or any injury to Johns arising out of the use of or any defect in such machine, but instead were with respect to an injury arising out of the negligent representations of Reed's saleman as to the utility of an article manufactured by a company in no way connected with Reed. Reed's liability for such negligent representations is clearly not included in the products coverage of the insurance policy and is expressly and specifically included within the "Premises-Operations" coverage.

The fact that in the MARYLAND case other grounds of recovery were asserted against Reed, which were within the products coverage of the insurance policy, is, of course, immaterial. The law is well settled in Texas and elsewhere that an insurance company is obligated to defend its assured if any ground of recovery is asserted coming within the terms of the policy, even though other grounds are asserted which are not within the policy coverage. MARYLAND CASUALTY COMPANY v. MORITZ, 138 S.W. 2d 1095, and BOUTWELL v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION, 175 F. 2d 597.

The Insurance Company also contends in connection with the first question raised by its Petition for a Writ of Certiorari that the holding of the Court of Appeals in this case is contrary to the Texas decision in FARMERS COOPERATIVE SOCIETY No. 1 v. MARYLAND CASUALTY COMPANY, 135 S.W. 2d 1033. We are at a loss to comprehend the Insurance Company's reasoning in this regard. In the FARMERS COOPERATIVE case, the injury arose out of the explosion of a product distributed by the assured, while in this case the

injury arose out of a negligent representation of Reed's salesman as to the safety and utility of the product of another manufacturer. Further, the insurance policy involved in the FARMERS COOPERATIVE case was entirely dissimilar to the insurance policy in this case. The policy involved in the FARMERS COOPERATIVE case was limited to accidents on the assured's premises and the case was decided upon the point that the policy did not cover the injury in question because the accident did not occur on the premises of the assured. As we have pointed out above, the insurance policy in this case specifically covers accidents arising out of the operations of Reed's outside salesmen everywhere in the United States. (R. 19) For these reasons the FARMERS COOPERATIVE case and the other cases cited in support of the Insurance Company's first question which also involved insurance policies limited to accidents occurring on the assured's premises are clearly inapplicable to the instant case.

The Texas Courts have held that insurance policies similar to the one involved in this case clearly cover all operations of the assured, whether on the assured's premises or elsewhere, which are necessary or incidental to the regular use of the premises. LLOYDS CASUALTY INSURER v. MCCRARY, 229 S.W. 2d 605, and HARDWARE MUTUAL CASUALTY COMPANY v. SCHANTZ, 186 F. 2d 868. These cases establish that the operations coverage of insurance policies such as the one involved in this case is not vitiated by the fact that the accident occurs while the injured party is using a product of the assured. The opinion of the Court of Appeals is in conformity with such decisions, and the Insurance Company has failed to show any conflict with the decisions of any other court.

## II.

**The Court of Appeals correctly held that an operation consisting of a negligent representation made for**

**the purpose of, and reasonably calculated to induce action is not completed until the person to whom the representation is made acts in reliance upon that representation.**

The second and final question presented in the Insurance Company's Petition for a Writ of Certiorari is in substance whether the Court of Appeals erred in holding that the negligent representations of Reed's salesman did not constitute a completed operation until Johns acted in reliance upon such representations. In this connection, the declaration in the Maryland suit against Reed alleged "that some time *immediately prior*" to the date of the accident, the employer of Johns made inquiry from Reed's salesman as to the best type of grinding wheel to be used on one of Reed's machines; that the salesman advised that a type of wheel manufactured by Bay State was the type of wheel fit for the purpose intended, and that such wheels were then ordered from Bay State and turned over to Johns for his use. (R. 40, 41) However, despite these allegations in the Maryland suit that the negligent representations and operations of Reed's salesman were made *immediately prior* to the accident, nevertheless the Insurance Company contends that such operations are excluded from the "Premises-Operations" coverage of the policy by the second clause of the products coverage, which reads as follows:

> "* * * and operations covered under divisions 1 and 3 of the Definition of Hazards, *other than pick-up and delivery and the existence of tools, uninstalled equipment* and abandoned or unused materials, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from such premises." (R. 21)

It should be noted that the above quoted clause from the products coverage is limited to completed or abandoned operations in connection with the installation of products or equipment. It does not purport to cover and expressly excludes operations with regard to "uninstalled equipment." In this case the complaint reveals that Johns did not attempt to recover for injuries arising out of any completed or abandoned operations in connection with the installation of products or equipment, but on the contrary, sought recovery for injuries arising out of a negligent act or operation by the agent of Reed in misrepresenting the safety or utility of uninstalled equipment manufactured by a company in no way connected with Reed. Therefore, the case of STANDARD ACCIDENT INSURANCE COMPANY v. ROBERTS ET AL., 132 F. 2d 794, and the other cases cited on pages 9 and 10 of the Insurance Company's brief are wholly inapplicable to the facts of the instant case. Each and all of such cases involve the question of whether or not the work in connection with the installation or service on installed equipment had been completed or abandoned. The tort complained of by the injured party in each of such cases arose out of a condition or defect in the product or equipment brought about by the installation of, or service upon, such product or equipment. In none of such cases was the tort complained of by the injured party an act or doing of something which did not involve installed equipment. Each and all of such cases were concerned with the installation or use of a product or equipment. Each and all of such cases were concerned with an explosion of, or some such happening upon, the assured's product, machine, or equipment. In none of such cases was there involved the question of liability where the tort complained of was an act or negligent representation or misrepresentation of fact on the part of the assured or one of the assured's agents.

Furthermore, to adopt the Insurance Company's contention that the operations of Reed's agent were completed and abandoned immediately upon the making of his statement or misrepresentation would be to hold that the accident must have happened simultaneously with the making of such statement or misrepresentation. Such a holding would ignore the express agreement of the Insurance Company in the insuring clause of the policy to indemnify Reed for damages sustained by others caused by and "arising out of" Reed's operations and would require that the words "arising out of" must by some strained, illogical construction be held to mean only "in" and at one and the same time as the operation of Reed. As the Court of Appeals pointed out, such a construction "would result in relieving the Insurance Company from any liability for negligent representations of the agents or salesmen of the insured because, of course, no person could be insured as a result of acting upon a negligent representation until after the representation had been made to him." (R. 54)

A case directly in point is the decision of the Pennsylvania Court in PROTANE CORPORATION v. TRAVELLERS INDEMNITY COMPANY, 22 A. 2d 674, which was expressly approved by the Supreme Court of Texas in LLOYDS CASUALTY INSURER v. MCCRARY, 229 S.W. 2d 605, 609.

## Conclusion

For the reasons hereinabove set forth, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied. The Insurance Company states in its brief that the decision of the Court of Appeals in this case has been a shock to insurance underwriters generally. It is indeed regretable that the insurance underwriters find it shocking that the Court will not permit them to escape liability for the specific coverage of the operations hazard insured against

in their policies by resorting to a strained, illogical construction of the wording of the products coverage of the policy in order to arrive at some curious, hidden meaning which would have the effect of relieving them from all obligations under the policy. Moreover, the decision is not in conflict with adjudicated case law. It is in express accordance with authority in Texas and generally throughout the United States. The underwriters wrote the policy and are bound by its language by all settled rules of insurance construction.

Respectfully submitted,

J. VINCENT MARTIN,
*Counsel for Respondent*

VINSON, ELKINS & WEEMS,
T. B. WEATHERLY,
J. D. HEAD,
*Of Counsel*

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HAROLD B. WILLEY,

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## PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF

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RUSSELL TALBOTT,
FULBRIGHT, CROOKER,
FREEMAN & BATES,
*Of Counsel*

JOHN H. CROOKER,
*Attorney for Petitioner*

ALPHA LAW BRIEF CO., HOUSTON

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## PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF

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Because of certain statements and arguments made in Respondent's Brief, Petitioner respectfully makes this reply. For easy reference, Petitioner will use the same headings that were used by Respondent in its Brief.

### Statement of the Case

Respondent, Reed Roller Bit Company (hereinafter called "Reed"), says that by Endorsement No. 1, the coverage of the insurance policy is specifically extended to in-

clude the operations of Reed's outside salesmen in certain states. Petitioner, Pacific Employers Insurance Company (hereinafter called "the Insurance Company"), admits that Reed's operations, including those of its salesmen, throughout the United States, were covered, BUT subject to the terms, conditions, and exclusions of the policy. One of these was the exclusion from the "Premises-Operations" hazard of anything that could have been covered under the "Products" hazard. The endorsement referred to by Reed (R. 19) by its terms had nothing to do with the extent of the coverage. It dealt only with the premium charges based upon the classification of operations. It provided "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, or limitations of the policy * * * ". The endorsement contained no insuring clauses and none of the obligations or rights of either party can be determined therefrom except the amount of estimated premium. To say that this endorsement shows an intention to cover the operations of salesmen, which operations would otherwise be excluded, would be as ridiculous as an argument that the endorsement covered salesmen while they were playing ball with their children in their own backyards.

## Argument

### I.

Reed argues that the "Products" hazard would not cover negligent representations of its salesmen as to an article manufactured by another when used with and in fact connected to an article manufactured by Reed. Reed argues that for the "Products" hazard to afford coverage, the accident must have been caused by some defect in a product manufactured by Reed. These propositions are not true, and are not in accord with the facts. Had Reed purchased and

paid for "Products" coverage, the Insurance Company would have been obligated to pay for liability imposed upon Reed for damages "caused by accident and arising out of * * * the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the named assured, if the accident occurs after the assured has relinquished possession thereof to others and away from premises owned, rented or controlled by the assured:" (R. 21). The argument ignores the plain wording of the policy as quoted. The accident arose out of the handling of a grinding machine manufactured by Reed. It is true that it was an emery wheel not manufactured by Reed which was attached to this grinding machine that disintegrated. The accident nevertheless arose out of the handling of Reed's product and whether the proximate cause of the accident was a defect in Reed's product or a defect in the emery wheel is immaterial. The coverage that would have been provided by "Products" was broader than simple coverage for defects in Reed's manufactured articles. Defect or not, accidents arising from the handling of Reed's products away from its premises could have been covered under "Products".

Reed argues that LLOYDS CASUALTY INSURER v. MCCRARY, 229 S.W. 2d 605, and HARDWARE MUTUAL CASUALTY COMPANY v. SCHANTZ, 186 F. 2d 868, establish that the "Premises-Operations" coverage applies though the injured party is using a product of the assured. In neither of those cases was the question presented as to whether the handling of a product of the assured was excluded. In neither of those cases was the question even discussed. In the SCHANTZ case, a hoist of another's manufacture had been repaired by the assured. In both cases the principal question presented and discussed was whether that particular operation had been completed.

## II.

Reed argues that the "Products" coverage is limited to completed operations in connection with the installation of products or equipment. This is ingenious, but not persuasive. The "Products" coverage is split fairly in the middle by a semi-colon, and the two clauses cover two different things. First clause—accidents from handling of products of the assured away from the assured's premises. Second clause—accidents from completed operations away from the assured's premises. No mention is made in either clause that such completed operations must have involved installation of products. With certain specific exceptions (accidents from pick-up and delivery, existence of tools, uninstalled equipment and abandoned and unused materials), all operations of *any* character that had been completed away from the premises would have been covered under the second clause of "Products".

Reed argues that Johns' accident arose out of operations, to-wit, negligent representations, and since the accident could not have happened until Johns acted upon the representations, therefore the operations had not been completed. In the first place, this argument stresses only the words "arising out of" and completely ignores the words "after such operations have been completed or abandoned" in the exclusionary clause (the "Products" hazard). It is obvious that accidents arise out of both completed operations and those that are in progress; that there are many risks attendant upon completed operations and many upon those that are in progress, and that one might be insured and the other not so insured—that was the intention here.

Reed, from this same erroneous premise, says that no coverage is afforded and the premium was paid for nothing because no person could be injured by a representation until after it was made. Tort liability (as distinguished from

warranty) is seldom predicated upon representations and the additional risk for completed representations may not have been great, but Reed ignores the fact that it paid a premium for "Premises-Operations" coverage with the many risks both on and off the premises, and the risks from completed operations on the premises for which it received protection, but it did not pay a premium for the risk of the handling of its products by others away from the premises, or the risk of accidents from completed operations away from the premises. If correct in its contention, this policy, intended to give protection against many risks of a large and far flung enterprise, would give complete protection against everything, on or off the premises, completed or incompleted, and whether from handling of products or not.

## Conclusion

Petitioner respectfully submits that its Petition for a Writ of Certiorari should be granted.

JOHN H. CROOKER,
*Attorney for Petitioner*

RUSSELL TALBOTT,
FULBRIGHT, CROOKER,
FREEMAN & BATES,
*Of Counsel*